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In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

DeAnna Brayton, *Petitioner,*

v.

City of New Brighton, *Respondent.*

On Petition for a Writ of Certiorari to
the Minnesota Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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48 pp

QUESTIONS PRESENTED

A municipal sign ordinance generally permits only one sign per private residence. It contains certain exceptions, however, allowing a virtually unlimited number of political campaign signs for a few weeks before and after an election, and also relaxing the restrictions in the case of certain commercial and non-commercial signs described in the ordinance.

1. Even if the ordinance is content-neutral, is the one-sign limit unduly restrictive of expression protected by the First Amendment?

2. Does the exception allowing a virtually unlimited number of political campaign signs during election season render the ordinance content-based, and if so, can the ordinance survive the required level of judicial scrutiny?

3. Do other exceptions contained in the ordinance render it content-based, and if so can the ordinance survive the required level of scrutiny?

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City of New Brighton, *Respondent.*

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DeAnna Brayton respectfully petitions for a writ of certiorari to review the decision of the Minnesota Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Minnesota court of appeals (App., *infra*, 1a-12a) is reported at 519 N.W.2d 243 (Minn. App. 1994). The order of the Minnesota supreme court denying review (App., *infra*, 13a) and of the state district court (App., *infra*, 14a-21a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 26, 1994 (App., 1a). The Minnesota supreme court denied review on September 28, 1994 (App., 13a). By order of Justice Thomas, the time in which to file this Petition was

extended through January 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTORY PROVISIONS INVOLVED

Chapter IX of the Code of Ordinances of the City of New Brighton regulates signs displayed within the city. Those portions of Chapter IX relevant to this action appear at App., 22a–25a.

STATEMENT

A. The Facts Pertinent to this Action

Petitioner's action consists of a facial challenge to portions of the code of ordinances of the city of New Brighton, Minnesota. Thus the facts material to the consideration of the questions presented are simple and straightforward. Furthermore, as the court of appeals recognized, those facts are not in dispute. App., 2a.

Petitioner is a resident of New Brighton, a suburb within the Minneapolis–St. Paul metropolitan area, and (with her husband) a homeowner there. In March 1991, she placed two small signs in her front yard. One of the signs, approximately 2 feet by 4 feet, criticized a decision by a district court judge in an animal cruelty case. The other sign, approximately 1 foot by 1½ feet, stated her opinion concerning other issues related to the treatment of animals. App., 2a. Shortly thereafter Petitioner received a letter from the City informing her that her signs violated the municipal code, and directing her to remove them. App., 2a.

Petitioner complied. She then asked city officials to amend the ordinance, claiming that its restrictions were unconstitutional. Eventually the council did amend the ordinance. However, because Petitioner did not believe that the amendments corrected the constitutional defects, she commenced this action in Ramsey County District Court, seeking declaratory and injunctive relief, contending that certain portions of the ordinance violated her rights arising under the First Amendment as applied to the states by the Fourteenth Amendment. App., 2a.

As amended, the ordinance generally permits only one sign per residence, specifically one "non-commercial opinion sign," subject to certain exceptions. §9-040(c)(16). A non-commercial opinion sign is defined (§9-030(o)) as a sign that "does not advertise products, goods, businesses, or services and which expresses an opinion or other point of view." App., 23a. A major exception to the one-sign rule relates to political campaign signs. Section 9-040(c)(8) effectively allows residents to post an unlimited number of such signs during the election season, i. e., one campaign sign per candidate and issue on each frontage. App., 24a. (A campaign sign is defined in §9-030(c) as "a temporary sign promoting the candidacy of a person running for governmental office or promoting a position on an issue to be voted on at a governmental election." App., 22a.) A related provision (§9-040(c)(16)) states that "[a]ny sign permitted by this paragraph [governing campaign signs] may be used, in lieu of other uses permitted by this paragraph, as a non-commercial opinion sign." App., 25a.

In other words, residents may post one sign on their property year-round, whether it be an opinion sign or a campaign sign. During the political campaign season, residents may also display either non-commercial opinion

signs, or campaign signs, up to the total number of campaign signs allowed. App, 3a. Petitioner desires to display more than one non-commercial opinion sign at times of the year other than campaign season.

The ordinance also addresses a miscellany of specific types of signs, such as "for sale" and "for rent" signs, service station signs, bus stop bench signs, and holiday signs. See §9-040.

In its prefatory section, New Brighton's sign ordinance states a number of interests sought to be advanced by the restrictions on signs that it incorporates. §9-010, App., 22a. These include preservation of the residential character of residential neighborhoods, order and cleanliness, protection of property values, reducing traffic hazards, and promotion of aesthetic concerns.

B. Proceedings Below

On November 22, 1993, the Ramsey County District Court, the Honorable Gregg E. Johnson presiding, entered summary judgment in favor of Respondent. The district court concluded that the ordinance was content-neutral and that it did not favor "political speech over opinion speech." App., 17a. The court then applied the tests expressed in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), holding that the ordinance satisfied each of them: It was narrowly tailored to serve significant governmental interests (specifically rejecting Petitioner's argument that the one-sign limit was broader than necessary to achieve the ordinance's objectives); and Petitioner had adequate alternative channels of communication. From this the court determined that the ordinance was a reasonable time, place, and manner regulation. *Id.*, 21a.

Petitioner perfected an appeal to the Minnesota court of appeals. On July 26, 1994, the court affirmed the decision of the district court, reaching closely similar conclusions. Relying on principles expressed in *Ward*, the court of appeals agreed that the New Brighton ordinance was content-neutral. App., 9a. In reaching this result the court cited the fact that the ordinance does not contain a complete prohibition on opinion signs and that it does not allow a greater number of campaign signs than opinion signs, since during the election season a resident may erect as many opinion signs as political signs (potentially "dozens," *id.*, 8a, n. 2), and during the remainder of the year, when only one sign is allowed, a resident may choose between a political sign and a campaign sign; in addition, other types of signs (such as "for sale" signs) are limited for the most part to just one. *Id.*, 8a–9a.

The court of appeals then applied the other criteria prescribed in *Ward*, as had the district court. It determined that the ordinance was narrowly tailored to serve substantial governmental interests (*id.*, 10a), and that there were sufficient alternative channels of communication available, noting that even though only one sign could be posted for most of the year, the message on the sign could be changed (*id.*, 10a–11a). The court also emphasized the importance of the city's police power in terms of regulating signs (*id.*, 11a).

Petitioner thereafter duly petitioned the Minnesota supreme court for review of the court of appeals decision, which is discretionary. By order dated September 28, 1994, that court denied Petitioner's request for review. App., 13a.

C. How the Federal Questions were Presented

The complaint filed by Petitioner initiating this action alleged that "the placement of signs on [petitioner's] property is a constitutionally protected activity, the restriction of which violates her freedom of expression under the First Amendment to the United States Constitution." Before both the district court and the court of appeals petitioner expressly argued that the one-sign limit and the lack of content-neutrality did not comport with mandates articulated by this Court. Those courts nonetheless held that the ordinance was not inconsistent with the First Amendment. In doing so, they specifically rejected the arguments raised by Petitioner. App., 17a–19a and 6a–10a. Petitioner's petition for review to the Minnesota supreme court contended that the United States Supreme Court "has consistently and expansively protected lawn signs containing non-commercial speech placed by individuals on their own property, rigorously limiting the scope of regulations concerning such signs." The petition was denied without explanation. App., 13a.

REASONS FOR GRANTING THE PETITION

In approving an ordinance that for the most part permits residents to display only one sign on their property, and that plainly fails the test of content-neutrality, the Minnesota appellate courts have created a precedent by which to evade core First Amendment principles as expressed by this Court, one that will potentially affect citizens in thousands of municipalities throughout the country.

I. The Decision of the Minnesota Court of Appeals is Erroneous.

Last term this Court unanimously held that a municipal ordinance prohibiting all residential signs violated the First Amendment. *City of Ladue v. Gilleo*, 512 U.S. ___, 114 S.Ct. 2038 (1994). The decision instructed that First Amendment protections apply with particular force to private residential property. But because the ordinance challenged in *City of Ladue* banned *all* signs, the Court did not reach the issue raised by the sorts of municipal regulations that occur much more commonly, where the number of signs is severely restricted but not quite barred entirely.

The instant case presents the issue in its starkest form. By generally allowing only one sign per residence, the ordinance challenged by Petitioner exemplifies the most restrictive possible regulation short of an outright ban. Despite this Court's opinion in *City of Ladue*, the Minnesota court of appeals concluded that a one-sign limit was not unconstitutional.

The fact that a "special respect for individual liberty in the home has long been a part of our culture and our law," and that "that principle has special resonance when the government seeks to constrain a person's ability to *speak*," *City of Ladue*, 114 S.Ct. at 2038 (emphasis in original; citations omitted), was of no discernible importance to the court below. Its opinion dismissed this Court's decision in a footnote, concluding that it was "simply instructive on the general principle that when municipalities use their legitimate police power to regulate signage, that power needs to be narrowly tailored to protect legitimate governmental interests." App., *infra*, 7a. The Court of Appeals compounded this misreading by seemingly contending that *City*

of Ladue turned on a finding that the ordinance at issue there was not content-neutral:

> The failure of the municipal ordinance in the City of Ladue is simply put. The *Ladue* ordinance attempted to ban *all* residential signs except for those falling within one of certain stated exemptions. Thus by analogy, those purposes falling within the listed exemptions were preferred over all others.

App., 7a, n. 2.

In reality, the Court in *City of Ladue* never found it necessary to reach the issue of whether the ordinance was content-neutral or content-based, as Justice O'Connor noted in her concurring opinion. 114 S.Ct. at 2047–48. The Court assumed *arguendo* that the ordinance did not discriminate on the basis of content or viewpoint, *id.*, 114 S.Ct. at 2044, striking it down mainly because it had "almost completely foreclosed a venerable means of communication that is both unique and important." *Id.*, 114 S.Ct. at 2045. The Court concluded that "the need to regulate temperate speech from the home is surely much less pressing," and "more temperate measures could in large part satisfy Ladue's regulatory concerns without harm to the First Amendment rights of its citizens." *Id.*, at 2047.

Thus, the threshold issue presented in the instant case is not whether the New Brighton ordinance is content-neutral, but whether on any basis the one-sign limit is consistent with the interpretation of the First Amendment expressed in *City of Ladue*, since "even content-neutral restrictions that unduly constrict the opportunities for free expression" are objectionable. *Id.*, 114 S.Ct. at 2045, n. 13 (citation omitted). Though the one sign allowed by New Brighton is

incrementally better than the outright ban addressed in *City of Ladue*, it is hardly reflective of that "special respect for individual liberty in the home" recognized in this Court's decision.[1]

So far as Petitioner can determine, in none of the numerous cases involving challenges to municipal sign ordinances, either in this Court or in the lower appellate tribunals, has an ordinance permitting only one sign per residence ever been sustained. Indeed, even restrictions more liberal than New Brighton's have been struck down as contrary to the First Amendment; see for example *Arlington County Republican Committee v. Arlington County*, 983 F.2d 587 (4th Cir. 1993), where the Court of Appeals ruled that a county regulation allowing two signs per frontage was inconsistent with the Constitution's protections. Therefore, in the instant case the courts below have plainly ignored the principles on which *City of Ladue* rests.

Additionally, the New Brighton ordinance is not content-neutral in any event. The Court has made it clear that the constitutionality of a law burdening protected speech on

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[1]The court of appeals also suggested that the one-sign limit was not unacceptably rigid because a resident could periodically change the message on the sign, and because multiple messages could appear on the sign. App., 7a–8a. Aside from the condescension this reflects, it is objectionable on several expressive and pragmatic grounds: The mere act of displaying multiple signs conveys a heightened level of engagement and concern about the community, and potentially encourages others to become similarly involved. Also, the strength of a person's commitment to an issue can be demonstrated by the duration of signs addressing it. *Cf. City of Ladue*, 114 S.Ct. at 2046. Furthermore, problems caused by weather, disability, equipment, and similar considerations may materially interfere with one's ability to change signs regularly. Finally, it is difficult to adequately express one message on a sign, to say nothing of multiple messages.

private property or in a traditional public forum will often turn on whether its restrictions are content-neutral. *Simon & Schuster, Inc., v. New York Crime Victims Board, 502 U.S. ___, 112 S.Ct. 501 (1991).* As this Court's previous decisions demonstrate, municipal sign ordinances indisputably burden protected expression. Ordinances that permit certain signs based solely on the content of the speech they contain, while prohibiting others, have invariably been held to fail the test of content-neutrality. *Id.*; see also *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490, 514 (1981) (plurality opinion).[2]

As noted in the Statement, the New Brighton ordinance contains certain exceptions to the normal one-sign limit found in §9-040(c)(16). App., 25a. The most important is for "campaign signs." For a brief period before and after an election, a virtually unlimited number of such signs is permitted by the ordinance, since §9-040(c)(8) allows one campaign sign per candidate and issue on each frontage. App., 24a. There is no requirement that the candidate or the issue be one with respect to which residents are eligible to vote. Thus a person might theoretically display as many campaign signs as there are electoral candidates or issues in the United States, or, for that matter, in the world.

Even if the city sought to interpret the ordinance so as to apply only to elections in which local residents have some involvement (which it has not),[3] a large number of signs

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[2]There is no issue here of regulable conduct, which may be restricted so long as the effect on expression is incidental. See *Texas v. Johnson*, 491 U.S. 397 (1989).

[3]Such an interpretation has no basis in the language of the ordinance, and would seem constitutionally dubious as well.

could still be erected on any given property during campaign season. However, the ordinance imposes a relatively severe durational restriction on campaign signs, permitting them only "from the last day of candidacy filing, or one (1) month before the election, whichever is *later*" (emphasis added).[4] §9.040(c)(8), App., 24a. The same section mandates the removal of campaign signs within 5 days after the election.

Since under §9-040(c)(8) a resident may substitute non-commercial opinion signs for campaign signs, up to the maximum number of campaign signs allowed at any given time, App., 24a, residents are allowed to display more than one non-campaign opinion sign only during election season. Otherwise the general rule of §9-040(c)(16) prevails, and just one sign can be displayed.

Petitioner contends that because of the seasonal nature of political campaigning, the portions of the ordinance described above incorporate a strong preference for campaign signs over other varieties, particularly over non-commercial opinion signs. For the great majority of citizens, campaign signs serve no function and have no attraction except during election season. Obviously, very few people erect them at any other time of the year. It is equally obvious that few people desire to display more than one campaign sign for

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[4]The issue of exactly when different candidates must file appears to vary for different offices. In no event, however, are the applicable time periods particularly lengthy. In the proceedings below, Respondent agreed that state statute preempts the ordinance in general election (even-numbered) years; thus under Minn. Stat. §211B.045, campaign signs must be allowed at least between August 1 and seven days after the general election. In odd-numbered years, however, the city concedes that campaign season would be only 40 days long under the ordinance. Defendant's Reply Memorandum in Support of Summary Judgment Motion, p. 7.

each issue or candidate. Thus the New Brighton ordinance does not in any practical sense impose restrictions on campaign signs. Limiting political lawn signs to the election season is no more burdensome than restricting Christmas displays to the months of December and January.

There is no season, however, for many issues about which citizens may hold strong opinions. For example, an innumerable range of controversial questions continually comes before Congress, state legislatures, and municipal boards and councils. In addition, citizens often react strongly to myriad governmental actions having nothing to do with legislative bodies (as Petitioner did when she posted signs criticizing the actions of a district court judge), as well as to other social issues in which government is not even directly involved. Residents may wish to express their views via signs on many of these topics, but unless any of them relates to a ballot question, the New Brighton ordinance forces residents to choose just one.

In short, by permitting virtually as many campaign signs as any resident would ever want to display, while according no such advantage to signs concerning non-campaign topics, the city makes an impermissible distinction on the basis of content. As a result, the ordinance is clearly not content-neutral. This Court has expressly recognized that favoring political campaign speech over non-commercial, non-campaign speech involves a content-based distinction:

> An assertion that "Jesus Saves," that "Abortion is Murder," that every woman has the "Right to Choose," or that "Alcohol Kills" may have a claim to a constitutional exemption from the ordinance *that is just as strong* as "Roland Vincent—City Council." To create an exception for appellees' *political* speech

> and not these other types of speech might create a risk of constitutionally forbidden content discrimination.

City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816 (1984) (emphasis added).

The exception for campaign signs raises one important related issue. As this Court observed in *City of Ladue*,

> Exemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: It may diminish the credibility of a government's rationale for restricting speech in the first place.

114 S.Ct. at 2044. During the election season, as noted earlier, a New Brighton resident could erect literally dozens of lawn signs, one for every candidate and issue. From this, only two conclusions are possible: Either the urgency of the city's interests in strictly limiting the number of lawn signs is a pretense, since the ordinance may effectively be ignored during election season, or the city council intended to create a preference for campaign signs strong enough to override those interests.[5] If the former, then the city's credibility in defending the one-sign limit is indeed diminished; if the latter, the ordinance would indisputably impose a content-

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[5]The opinion of the Minnesota court of appeals effectively acknowledges the existence of such a preference, though the opinion entirely fails to acknowledge that it would create a content-based distinction. Discussing the exception for political campaign signs, the court states that "[t]he City can also reasonably conclude that the balance shifts in favor of fewer limitations during the short election season." App., 10a.

based restriction sufficient to render it presumptively unconstitutional.

The constitutional deficiencies of the ordinance are illustrated by other content-based restrictions as well. These restrictions affect major categories of protected speech. For example, several types of signs, including some commercial varieties, are not subject to any durational limitations, even though (as just discussed) campaign signs do have such restrictions imposed on them. Under §9-040 of the ordinance, several varieties of signs either have no durational restrictions or benefit from *more* generous ones than do campaign signs, and in addition are not subject to the numerical limits (one per frontage) imposed on non-commercial signs and campaign signs other than during the campaign season. These include signs on bus stop benches (which may also be 10 square feet) [(b)(5)]; signs for the promotion of civic celebrations (no numerical limit) [(b)(6)]; real estate sale, school event, and produce sale signs [(c)(7)]; "For Sale" and "For Rent" signs [(c)(9)]; gasoline service station full-price signs (which may be 16 square feet; one sign allowed for each type of fuel) [(c)(11)]; and seasonal holiday decorations and signs [(c)(12)]. App. 23a–25a.

Such content-based distinctions not only offend the precedents prohibiting discrimination among different categories of non-commercial expression, but also are plainly contrary to this Court's unconditional admonitions against preferring commercial speech to non-commercial expression. See, e.g., *Metromedia*, *supra*, 453 U.S. at 513. Any such preference almost invariably renders the regulatory scheme invalid as a content-based restriction. Yet the New Brighton ordinance favors, for example, gasoline service station signs (one sign year-round for *each* type of fuel) over non-commercial opinion signs (only one sign except during election season).

A content-based regulation is subject to strict judicial scrutiny: To survive, the regulation must among other requirements be necessary to serve a compelling governmental interest. *Simon & Schuster, supra*, 503 U.S. at 332. The close parallels between the ordinance invalidated in *City of Ladue* and the New Brighton ordinance challenged by Petitioner make it unlikely that New Brighton's restrictions could meet this test.

The interests served by the New Brighton sign ordinance, described at §9-010, App., 22a, are substantially the same interests underlying the ordinance invalidated in *City of Ladue*; see 114 S.Ct. at 2041. All are laudable, and most constitute, as the Court has recognized, substantial governmental interests. See *Taxpayers for Vincent*, 466 U.S. at 806–07. Although Petitioner does not dispute that "government may regulate the physical characteristics of signs" within reasonable bounds, *City of Ladue*, 114 S.Ct. at 2038, the interests relied on by New Brighton (whether separately or in combination) have never been held to be sufficiently compelling to support content-based restrictions in sign ordinances.

II. The Questions Presented are Important.

The opinion of the court below demonstrates how readily the principles on which *City of Ladue* rests can be evaded simply by invoking the fact that it deals only with the statistically unusual case of an ordinance that bans all signs. Petitioner respectfully suggests that if it is not rejected, that decision will both invite the adoption of similarly extreme proscriptions throughout the country, and ensure the continuance of those already in place. The principles articulated in *City of Ladue* will thereby be significantly diluted, if not eviscerated. If indeed the protections of the First

Amendment approach peak magnitude when a person seeks to engage in expressive activity on his or her own property, then municipal ordinances allowing only one sign to be displayed are hardly the "more temperate measures" referred to by the Court, and must therefore be nearly as offensive as was the regulation addressed in *City of Ladue*.

The instant case demonstrates that the propensity of local officials to interfere with signs displayed by residents plainly requires more constraint than *City of Ladue* can provide, where something less than an outright ban is at issue. This propensity is well documented. Not only has this Court dealt directly with sign ordinances in at least four decisions over the past few years,[6] but there are numerous other reported decisions from federal and state appellate courts during this span addressing the same subject. In most of them, the regulation at issue has been found constitutionally defective. But the regular appearance of these cases demonstrates that the inclination to restrict expression even on private property is a hardy one.

As a consequence, it seems virtually certain that municipalities throughout the country will interpret the opinion of the Minnesota court of appeals, and the refusal of the Minnesota supreme court to review it, as an invitation to adopt sign restrictions based on New Brighton's model. The decision of the court of appeals, and the rationale on which it relies, will be widely disseminated because the decision appears to be the first applying *City of Ladue* to test a municipal sign ordinance. The route mapped out by the

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[6]*Linmark & Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Metromedia, Inc., v. City of San Diego*, 453 U.S. 490 (1981) (plurality opinion); *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984); *City of Ladue, supra*.

court of appeals allows the limitations apparently erected in *City of Ladue* to be evaded. Because municipal sign ordinances are ubiquitous,[7] the result could well be severe restrictions on the ability of individuals throughout the country to display their opinions about political and social issues on their private property. This in turn could provoke a multitude of legal challenges. A decision by this Court affirming the importance of the First Amendment's protections in the case of the highly individual expression represented by residential signs would preempt such occurrences.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 30, 1995

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[7]It appears that "thousands of municipalities throughout the country" have some form of sign restrictions. See the brief *amicus curiae* of the National Institute of Municipal Law Officers, International City/County Management Association, U.S. Conference of Mayors, National League of Cities, and National Association of Counties, p. 20, submitted to this Court in connection with *City of Ladue*.

APPENDIX

Decision of Minnesota Court of Appeals, ... 1a

Order of Minnesota Supreme Court Denying Review 13a

Decision of Ramsey County District Court,
Hon. Gregg Johnson 14a

New Brighton Code, Chapter IX. Signs [Excerpts] . 22a

STATE OF MINNESOTA

IN COURT OF APPEALS

C0-94-252

Ramsey County — Randall, Judge
District Court File No. C7-93-2677

DeAnna Brayton,

Appellant,

vs.

City of New Brighton,

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Filed July 26, 1994
Office of Appellate Courts

S Y L L A B U S

This New Brighton city ordinance regulating the content and placement of yard signs did not violate constitutional principles of free expression.

Affirmed.

Considered and decided by Klaphake, Presiding Judge, Randall, Judge, and Norton, Judge.

OPINION

RANDALL, Judge

Appellant DeAnna Brayton commenced this litigation seeking declaratory and injunctive relief against respondent City of New Brighton (the City), asserting that a city ordinance regulating the content and placement of signs was unconstitutional. On the parties' cross-motions for summary judgment, the trial court ruled in favor of the City. We affirm.

FACTS

The material facts of this case are not in dispute. In March of 1991, appellant placed two signs in the front yard of her home in New Brighton. One of the signs, which was approximately 2 feet by 4 feet in size, expressed criticism of a decision by a district court judge in an animal cruelty case. The other sign, approximately 1 foot by 1-1/2 feet, expressed her opinion on other issues related to the treatment of animals.

Appellant received a letter dated April 5, 1991, from the New Brighton city planner informing her that the signs violated the New Brighton sign ordinance and directing her to remove them. Appellant complied with the City's directive and took down the signs.

Appellant complained to City officials, asserting that the ordinance is unconstitutional. On October 22, 1991, the ordinance was amended by the city council. Appellant subsequently initiated this action challenging certain portions of the amended ordinance as violative of the constitutional right of free expression.

As originally written, New Brighton Code Section 9-040, paragraph (c)(8) allowed for one campaign sign per candidate and issue to be posted only during the election season. There was no provision in the ordinance allowing for opinion signs at any time of the year. The purpose statement of the ordinance cited concerns of public safety.

As amended, Section 9-040, paragraph (c)(16) of the sign ordinance allows a resident to post one "non-commercial opinion sign" on its property, at any time.[1] The portion of the ordinance allowing campaign signs during campaign season was amended to include the following sentence: "Any sign permitted by this paragraph may be used, in lieu of other uses permitted by this paragraph, as a Non-Commercial Opinion Sign." Only this amended ordinance is at issue.

The trial court concluded, and the parties agree, that as amended, the ordinance allows a resident to post one sign on its property year round, whether it be an opinion sign or a campaign sign. During the political campaign season, a resident is allowed to post additional signs, up to one sign per ballot issue and per ballot candidate. The additional signs may be used to express either a campaign message or an opinion message. Said another way, the amended ordinance allows one noncommercial opinion sign to be posted year round and additional, campaign and/or non-commercial opinion signs during the election season.

In addition to the public safety concerns cited in the original ordinance, the amendments also list the following

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[1] A "non-commercial opinion sign" is defined as "[a] sign which does not advertise products, goods, businesses or services and which expresses an opinion or other point of view. * * *" Sec. 9-030 (Definitions), paragraph (o).

purposes of the regulation:

> [T]o preserve the residential character of residential neighborhoods; to preserve order and cleanliness; to avoid the appearance of clutter; to protect property values; to avoid litter and the growth of weeds around signs; to reduce the traffic hazard caused by distractions to motorists and impairment of sight lines; to ensure that the city remains an attractive place to live and work; to reduce administrative burdens; and to protect the health, safety, welfare, morals, convenience and comfort of the public.

ISSUE

Is the sign ordinance, as amended, constitutionally valid?

ANALYSIS

The parties agree that this appeal is limited to an assertion of facial invalidity of the ordinance (other initial claims for relief have been disposed of).

On appeal from summary judgment, the reviewing court must determine whether there are any genuine issues of material fact and whether the trial court erred in its application of the law. Offerdahl v. University of Minn. Hosps. & Clinics, 426 N.W.2d 425, 427 (Minn. 1988). The determination of the constitutionality of a statute is a question of law which this court reviews de novo. See Hibbing Educ. Ass'n v. Public Employment Relations Bd., 369 N.W.2d 527, 529 (Minn. 1985).

The following framework is useful in determining whether an ordinance restricting time, place or manner of speech will survive constitutional scrutiny:

> 1.) Does the challenged ordinance burden protected speech?
>
> 2.) If so, does the ordinance contain content-based restrictions or content-neutral restrictions?
>
> > a.) If the restrictions are content-based, are they necessary to serve a compelling government interest, and are they narrowly drawn to achieve that end?
> >
> > b.) If the restrictions are content-neutral, do they serve any substantial government interest, are they narrowly tailored to further this interest, and do they leave open ample alternative means for communicating the desired message?

See Simon & Schuster, Inc., v. New York Crime Victims Board, ___ U.S. ___, 112 S. Ct. 501, 508 (1991); Clark v. Community for Creative Non-violence, 468 U.S. 288, 293, 104 S. Ct. 3065, 3069 (1984).

The parties agree the limitation on speech contained in the ordinance is a burden on speech. The parties also agree that the City's interest in traffic safety, aesthetics, and retaining the residential character of its neighborhoods are "substantial," but not "compelling" governmental interests. Therefore, the issue is whether the ordinance is a content-neutral regulation and, if so, whether it satisfies the requirements of narrow tailoring and adequate alternatives so as to be a valid time, place, and manner regulation.

Content-neutral.

In determining whether a government regulation is content-neutral, the government's purpose is the controlling consideration. Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 2754 (1989). A regulation is content-neutral only if it is justified without reference to the content of the regulated speech. Id. at 791, 109 S. Ct. at 2754. The purpose portion of the ordinance states that it is based on concerns for public safety, order, cleanliness, aesthetics, and administrative convenience. Because these concerns are not related to content, the trial court concluded the ordinance is content neutral.

A regulation that places a higher value on certain topics of speech creates the danger of impermissible content discrimination. See City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 816, 104 S.Ct. 2118, 2135 (1984). Appellant argues that the ordinance is not content neutral because, as amended, it incorporates a preference for political signs over non-commercial opinion signs. Appellant bases her argument on the fact that the ordinance provides for additional signs during the political campaign season.

In support of her argument, appellant cites Goward v. City of Minneapolis, 456 NW.2d 460 (Minn. App. 1990) In Goward, the ordinance at issue permitted campaign related signs on private property but did not allow signs expressing an opinion critical of the city government. The ordinance was content-based because it permitted campaign signs while completely prohibiting opinion signs. The ordinance was found to be unconstitutional because it placed a total ban on a particular category of speech, namely, opinion signs. Id. at 465. The facts of the Goward case are not close to the facts of this case. The City of New, Brighton not only does

not totally ban anything, but carefully allows any opinion on any issue subject to the same time frames as political speech.

The trial court concluded the ordinance does not "favor" political speech over opinion speech because it does not allow a greater number of campaign signs than opinion signs. Both are treated identically at all times. The portion of the ordinance allowing campaign signs during campaign season, paragraph (c) (8) of section 9-040, was amended to include the following sentence: "Any sign permitted by this paragraph may be used, in lieu of other uses permitted by this paragraph, as a Non-Commercial opinion Sign." When read as a whole, the ordinance, as amended, allows a resident to post one sign on his property, year round, whether it be an opinion sign or a campaign sign. During the political campaign season, a resident is allowed to post additional signs, up to one per ballot issue and candidate. The additional signs may be used to express either a campaign message or an opinion message.[2] That is, during the

---

[2]Appellant urges on the court consideration of a recent U. S. Supreme Court case, City of Ladue v. Gilleo, ___ U.S. ___, 114 S.Ct. 2038 (1994). We do not find Ladue dispositive but simply instructive on the general principle that when municipalities use their legitimate police power to regulate signage, that power needs to be narrowly tailored to protect legitimate governmental interests. Minimizing visual clutter, maintaining property values, public safety, the elimination of traffic hazards, are legitimate purposes providing the regulations are carefully drawn, reasonable, and do not impermissibly prefer one kind of speech over another. The failure of the municipal ordinance in the City of Ladue is simply put. The Ladue ordinance attempted to ban all residential signs except for those falling within one of certain stated exemptions. Thus by analogy, those purposes falling within the listed exemptions were preferred over all others.

Here, the City of New Brighton has done no such thing. The ordinance at issue was carefully drawn to allow any opinion on any sign

campaign season, a resident is not limited to political speech but can put up as many noncommercial opinion signs as there are issues and ballots, the same as those professing political speech. During all other times of the year, a resident may put up one sign; either a noncommercial opinion sign or a campaign sign, with any message, and multiple messages, if desired, on the same sign. In contrast to Goward, the New Brighton ordinance is decidedly content neutral.

New Brighton allows various types of commercial signs such as "for sale" or "for rent" signs. Appellant asserts that since the posting of campaign signs is limited (outside the campaign season) in duration under the ordinance but commercial signs such as a "for rent" sign can be posted indefinitely, the ordinance impermissibly favors some forms of commercial speech over political speech. We disagree. Appellant's argument misinterprets the ordinance. The ordinance allows one noncommercial opinion sign to be posted at any time of the year for any length of time. That opinion sign can contain any type of non-commercial constitutionally protected speech. That sign, by definition, could include, outside the campaign season, political speech. Thus, one campaign sign or political sign can be posted at any time during the year with no durational limit. Further, New Brighton ordinances limit "for sale" and "for rent" signs

---

at exactly the same times that political signs are allowed. During the campaign season, campaign signs and noncommercial opinion signs are virtually unlimited. The only limit is one sign per ballot issue and one per ballot candidate. Between ballot issues, local elections, school board elections, judicial elections, state and national elections, a few to dozens of signs would be allowed. In the noncampaign season, campaign signs and noncommercial opinion signs had exactly the same privilege—one sign of any message on any issue at any time year around, with the added benefit to homeowners that the one sign could be changed daily and the one sign could contain any number of multiple messages.

to one per premises, the same numerical limit imposed upon opinion signs and political signs, except during a short campaign season where numerical limits go up to the number of ballot candidates and issues. Also, signs advertising garage sales, rummage sales, sale of produce grown on the premises, real estate sales, parade of homes production, and church or school events are limited to one per frontage, and these types of signs have durational limits as well. Thus, New Brighton has done as well as can be expected in balancing the rights of noncommercial opinion speech, political speech, for sale and for rent signs, casual and for business sale signs, et cetera.

When the smoke clears, Goward simply does not apply as it contains a total prohibition against opinion speech. There is no such prohibition in New Brighton.

We conclude the ordinance is content-neutral. We now turn to whether it (1) is narrowly tailored to meet significant governmental interests, and (2) leaves open adequate alternative channels of communication. Clark, 468 U.S. at 293, 104 S. Ct. at 3069.

Narrowly tailored to meet substantial government interests.

Appellant concedes that the interests involved, aesthetics and traffic safety, are substantial government interests. See Taxpayers for Vincent, 466 U.S. at 806-07, 104 S.Ct. at 2129-30; Metromedia, Inc., v. San Diego, 453 U.S. 490, 507, 101 S. Ct. 2882, 2892 (1981). The cases cited by appellant and respondent repeat the proper use of governmental power to protect substantial governmental interests if the protection is reasonable and narrowly tailored.

The requirement of narrow tailoring is satisfied if the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. Rock Against Racism, 491 U.S. at 799, 109 S.Ct. at 2758. The regulation need not be the least restrictive or least intrusive means of furthering the government's interests. Id. at 798, 109 S.Ct. at 2757-58.

Because the ordinance allows appellant to post at least one opinion sign, which can contain multiple messages, on one or multiple issues, at any time of the year, it is reasonably and narrowly tailored. The ordinance contains a modification for election season. The City can reasonably conclude that the concerns for aesthetics and public safety are served by the one sign (multiple message) limit that is in effect most of the year. The City can also reasonably conclude that the balance shifts in favor of fewer limitations during the short election season. See Goward, 456 N.W.2d at 464 (only the narrowest range of restrictions should be imposed by the city on political speech, the core of first amendment protection). We find no merit in appellant's assertion that the City's reasons for the ordinance are pretextual.

Alternative channels of communication.

To be constitutionally valid, a regulation must not impair the speaker's ability to convey a message to the desired audience. Goward, 456 N.W.2d at 467-68. Alternative channels of communication must exist and must be adequate. Taxpayers for Vincent, 466 U.S. at 812, 104 S.Ct. 2132. Here, appellant can present one or more opinion messages on one sign on her property at any time, and multiple signs with multiple messages during the election season. This satisfies the requirement of alternative channels

of communication. Although we do not rest our decision on this point, we agree with the trial court's observation that, in addition to the signage and the multiple messages, there are alternative means to express opinions such as handbills, picketing, and letters.

Appellant argues these additional means of communication—handbills, picketing, and letters—are not adequate as to her based on an assertion of lack of time and/or money. The trial court noted appellant's position on this issue but properly found that these alternative means of communication are in addition to the posting of one opinion sign at any time and additional opinion signs during the election season. Cf. Goward, 456 N.W.2d at 468 (a total ban on one form of political expression, namely, lawn signs, was unconstitutional).

Reasonable regulation and the reasonable use by a governmental entity of police power is as essential to the first amendment and free speech as the right of free speech itself. Concededly, the framers of our United States Constitution and its Bill of Rights mandated the judiciary to scrutinize the exercise of governmental police power. But the framers also assumed that the exercise of some police power was reasonable, did happen, that it would happen, and that it would be essential in a democracy. The complete absence of regulation and a total lack of police power is the definition of anarchy, of chaos. With anarchy the right to put dozens or hundreds of signs on one's lawn would be for naught since anyone disagreeing would simply walk into your yard, knock them over, and if you attempted to rebuild them, simply stay on the lawn and knock them over again.

The City of New Brighton's amended ordinance balances the City's inherent substantial interest in aesthetics,

residential home value visual clutter, and traffic hazards with the right of its residents to express opinions on nonpolitical, political, and business-oriented issues.

DECISION

This New Brighton sign ordinance does not violate first amendment principles of free expression. The trial court properly granted summary judgment in favor of the City.

Affirmed.

STATE OF MINNESOTA

IN SUPREME COURT

C0-94-252

DeAnna Brayton,

Appellant,

vs.

City of New Brighton,

Respondent.

ORDER

Based on all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of DeAnna Brayton for further review be, and the same is, denied.

Dated: September 28, 1994

BY THE COURT:

(s) A. M. Keith
Chief Justice

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

---------- FILE NO. C7-93-2677

DeAnna Brayton

Plaintiff,

vs. ORDER AND MEMORANDUM

City of New Brighton

Defendant.

The above matter came before the Honorable Gregg E. Johnson on Thursday, the 5th day of August, 1993, at the Ramsey County Government Center West, City of St. Paul. The matter was before the Court upon motions by both parties for summary judgement.

Mark R. Anfinson, Esquire appeared as counsel on behalf of the plaintiff, DeAnna Brayton. Charles L. LeFevere, Esquire and Corrine A. Heine, Esquire appeared as counsel on behalf of the defendant, City of New Brighton. Parties have stipulated that there are no material facts in dispute and are asking the court to rule as a matter of law.

The matter was submitted to the Court upon the arguments of counsel, the memorandum of law, including affidavits thereto, and all other pleading and papers contained in the Court file herein. The Court has reviewed and considered all the foregoing and, upon the same finds that as

a matter of law defendant is entitled to summary judgement.

NOW, THEREFORE, IT IS HEREBY ORDERED:

That defendant's motion for summary judgement is hereby granted.

LET JUDGEMENT BE ENTERED ACCORDINGLY.

Dated: 10/26, 1993

Gregg E. Johnson
Judge of District Court

MEMORANDUM

This case involves a constitutional challenge to an ordinance enacted by the defendant, City of New Brighton. Plaintiff seeks declaratory and injunctive relief arguing that as amended the ordinance violates protected speech under the First Amendment. As originally written the ordinance allowed only one campaign sign "per candidate and issue on each frontage." §9-040 para. (c)(8). The ordinance was amended in October 1991, and now allows one non-commercial opinion sign to be posted year round and additional, non-commercial opinion signs are permitted during election season subject to the same restrictions required of campaign signs. §9-040(c)(16). Both parties have moved for summary judgement.

The Court has developed a well-established body of case law setting forth the standards for review of governmental regulations that impact speech. Regulations enacted for the purpose of restraining speech on the basis of content, presumptively violate the First Amendment. City of

Renton v. Playtime Theaters, 475 U.S. U.S. 41, 46-47 (1986). However, an ordinance restricting time, place and manner will be permitted if: (1) it is justified without reference to the content of the regulated speech; (2) it is narrowly tailored to serve a significant interest; and (3) it leaves open ample alternatives channels of communication. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The application of these criteria to the New Brighton City ordinance illustrates that the ordinance as amended is constitutionally valid.

The first criteria under the Ward analysis is that the regulations must be content neutral. Content neutral regulations are those restrictions that are justified without reference to the content of the regulated speech. Ward, 491 U.S. at 791 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

The New Brighton ordinance is based on concern for public safety, order, cleanliness, aesthetics and administrative convenience. This concern is not content related and, therefore, satisfies the requirement that the regulation be content neutral.

Plaintiff argues that the ordinance is not content neutral because, as amended, it incorporates a "strong preference" for political signs over non-commercial opinion signs. This argument stems from the fact that the ordinance provides for additional signs during the political campaign season. Plaintiff views this aspect of the ordinance as a preference for campaign signs over non-commercial opinion signs.

To support her argument plaintiff cites the case of Goward v. City of Minneapolis, 456 N.W.2d 460 (Minn. Ct. App. 1990) where a city ordinance permitted campaign

signs on private property but prohibited opinion signs. Also cited was City Council v. Taxpayers For Vincent, 466 U.S. 789 (1984) which involved a city ordinance that prohibited the posting of signs on public property. Both ordinances were found to be unconstitutional because they placed total bans on particular categories of speech.

The New Brighton ordinance is distinguished from the ordinances found in both Goward and Vincent. The ordinance under review does not place a total ban on any particular category of speech. Plaintiff is not denied the forum of her property to express her views since an opinion sign may be posted year round. These factors distinguish this ordinance from Goward and Vincent and demonstrate content neutrality.

Furthermore, the City's ordinance does not favor political speech over opinion speech in that it does not allow a greater number of campaign signs than opinion signs. As amended, the ordinance allows a resident to post one sign on its property, year round, whether it be an opinion sign or a campaign sign. During the political campaign season, a resident is allowed to post additional signs, up to one per ballot issue and candidate. The additional signs may be used to express either a campaign or opinion message. Therefore, the ordinance as amended does not favor political speech over other forms of speech. Since the ordinance is not aimed at the content of plaintiff's signs and does not prefer one type of speech over another, the ordinance is content neutral.

The second criteria *[sic]* of the Ward test requires that the regulation be narrowly tailored to serve a significant governmental interest. In analyzing the interests of aesthetics and traffic safety the United States Supreme Court has held

that such interests constitute significant government interest. See Vincent, 466 U.S. 791, 807; Metromedia Inc. v. San Diego, 453 U.S. 490, 507 (1981).

While plaintiff correctly cites the case of Goward, 456 N.W.2d at 467, which held that "aesthetics interest *[sic]* alone cannot be a compelling interest," such a holding is not applicable here. The New Brighton ordinance, in addition to aesthetics, incorporates a number of other interests. These interests include:

> . . . to preserve the residential character of residential neighborhoods; to preserve order and cleanliness; to avoid the appearance of clutter; to protect property values; to avoid litter and the growth of weeds around signs; to reduce the traffic hazards caused by distractions to motorists . . . to reduce administrative burdens; and protect health, safety, welfare morals, convenience and comfort of the public. § 9-010.

Such factors, taken as a whole, provide overwhelming evidence of significant governmental interests.

The second criteria also requires the court to determine whether the ordinance is narrowly tailored. The requirement of narrow tailoring is satisfied "so long as the regulation promotes at substantial government interest that would be achieved less effectively absent the regulation". Community for Creative Non-Violence, 468 U.S. at 297. However, the regulation "need not be the least restrictive or least intrusive means of doing so." Id. at 298.

Here the City's significant interests of aesthetics and safety are directly served by the limitations the ordinance

places on residential signs. The ordinance as a whole is an attempt to improve the City's appearance and safety through regulation of many types of signs, and reaches no further than necessary to advance the City's interests. Without such a requirement the City's interests would be served less effectively.

This court rejects plaintiff's claim that the ordinance's prohibition of more than one opinion sign, except during the political campaign season, is broader than necessary to achieve its objectives. In Fisher v. City of Charleston, 425 S.E.2d 194, 201 (W. Va. 1992) a city ordinance was struck down for prohibiting political signs in residential areas. In analyzing temporary political signs the court concluded:

> Given the time, place and manner restrictions discussed in Ward . . . , we believe the zoning ordinance would be both reasonable and narrowly tailored if it permitted the placement of temporary political or candidate signs for specified period of time before primary and general elections, with the requirement that all signs must be removed within a specified period after the polls close.

Similarly, the New Brighton ordinance allows temporary political campaign signs during the campaign season. The duration of the campaign season is specified in the ordinance along with the period for removal of such signs. As in Fisher, this court finds such regulation to be reasonable and sufficiently narrowly tailored.

Plaintiff's claim that the ordinance is not narrowly tailored would have merit if the ordinance had a deleterious affect on her speech. Ward, 491 U.S. at 801. However, the New Brighton ordinance allows plaintiff to voice her opinion

on any issue year round. Furthermore, with the amendment, plaintiff is given additional opportunities to voice her opinion during the political campaign season. Since the ordinance allows the plaintiff to freely voice her opinion on any number of issues, the court finds the ordinance to be sufficiently narrowly tailored to achieve the City's objectives.

The third and final criteria under the Ward test requires that the ordinance leave open adequate alternative channels of communication. The issue is not merely whether alternative forums exist, but whether the alternative forums are adequate. A regulation that leaves open no adequate alternative channels must fail. Metromedia, Inc., 453 U.S. at 516.

A regulation that does not impair the speaker's ability to convey a message to the desired audience leaves open alternative channels of communication. See Playtime Theaters, 475 U.S. 41, 53 (1986); Vincent, 466 U.S. at 812; Ward, 491 U.S. at 802. This ordinance does not impair plaintiff's ability to communicate her desired message since she is allowed to present it year round. During the campaign season the plaintiff nay communicate other messages by posting additional signs. Therefore, the ordinance leaves open adequate alternative channels of communication. Furthermore plaintiff can express her opinion through such means as handbills, picketing and letters.

Plaintiff argues that such alternatives are an inadequate means of communication since they are not available to her due to lack of time, money or both. In support of her argument plaintiff cites the Goward case which rejected the view that handbills, picketing and letters are adequate alternative means of communication. Distinguishable from the ordinance in Goward is the fact that the New Brighton

ordinance allows alternatives such as handbills, picketing and letters in addition to the one sign allowed year round. The court finds that the third and final analysis under the Ward test is satisfied due to the fact that alternative channels of communication exist.

In summary, the New Brighton City Ordinance is a reasonable time, place and manner regulation to achieve a substantial governmental purpose. The ordinance is not directed at the content of the plaintiff's speech, plaintiff's speech is not impaired and ample alternative means of communication remain open.

NEW BRIGHTON CODE

CHAPTER IX. SIGNS [EXCERPTS]

Sec. 9-010. Purpose

It is the intent of this chapter to permit the use of signs which are compatible with their surroundings and are legible while at the same time assuring that the public is not endangered, or distracted by the unsafe or indiscriminate use of such signs.

The Council has determined that the regulations set forth in this chapter are necessary for the following reasons, among others: to preserve the residential character of residential neighborhoods; to preserve order and cleanliness; to avoid the appearance of clutter; to protect property values; to avoid litter and the growth of weeds around signs; to reduce the traffic hazard caused by distractions to motorists and impairment of sight lines; to ensure that the city remains an attractive place to live and work; to reduce administrative burdens; and to protect the health, safety, welfare, morals, convenience and comfort of the public.

Sec. 9-020. Permits

A permit shall be required for the erection, relocation, repair or modification of a sign regulated by this code, except those signs not requiring permits under section 9-040.

Sec. 9-030. Definitions

(c) *Campaign sign.* A temporary sign promoting the candidacy of a person running for a governmental office or

promoting a position on an issue to be voted on at a governmental election.

(o) *Non-commercial opinion signs.* A sign which does not advertise products, goods, businesses or services and which expresses an opinion or other point of view.

(t) *Temporary sign.* A sign, banner, pennant, balloon, streamers [sic] or advertising device intended to be displayed for a period not to exceed thirty (3) days.

Sec. 9-040. General provisions applicable to all districts

(b) The following signs are excluded from the requirements of this chapter:

(6) Any signs for the promotion of a civic celebration. Such signs shall be permitted by permission of the city council so long as they do not cause a threat to safety. Such signs must be established by the committee in charge of the civic celebration and a permit obtained, except no fee will be charged.

(c) The following signs are subject only to section 9-040(e)[1] and do not require permits.

(7) One (1) small sign per street frontage on each lot displayed for garage sales, rummage sales, sale of produce grown on the premises, real estate sales, parade of homes production or church or school events.

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[1]This section contains safety standards.

(8) One (1) campaign sign per candidate and issue on each frontage is permitted from the last day of candidacy filing, or one (1) month before the election, whichever is later. Such signs shall not exceed six (6) square feet in area and shall not be more than four (4) feet in height. Such signs are permitted on private property only and may be placed only upon approval of the property owner. No such sign may be located closer than seven (7) feet to the paved portion of a street. Where the sign is situated not closer than one hundred fifty (150) feet from the property line of an occupied residence, the area of the sign may increase to thirty-two (32) square feet and the height increase to six (6) feet; however, such sign must be set back from the property line a distance equal to one-third the distance of the district front yard setback requirement. Any sign permitted by this paragraph may be used, in lieu of other signs permitted by this paragraph, as a non-commercial opinion sign.

The owner of the property on which campaign signs are located shall be responsible for the removal of such signs within five (5) days after the election.

(9) One (1) unlighted "For Sale" or "For Rent" sign erected on the premises which is for sale or rent, such sign not to exceed six (6) square feet in area in residential districts and thirty-two (32) square feet in area in business and industrial districts.

(10) Gasoline service stations are permitted a double-faced full price sign(s) not exceeding sixteen (16) square feet for each type of fuel) sold on the site.

No more than one (1) price sign for one (1) type of fuel is allowed per street side.

(12) Seasonal holiday decorations are permitted so long as they contain no advertising. They must be removed within ten (10) days following the holiday.

(16) In addition to all other signs permitted under this Chapter, each lot which is being used for residential purposes may contain one non-commercial opinion sign for each street frontage. Such signs are permitted on private property only, may be placed only upon approval of the property owner, may not exceed six (6) square feet in area or four (4) feet in height, may not be located closer than seven (7) feet to the paved portion of a street, and must be at least five (5) feet from any other privately owned property.

MAR 2 1995

No. 94-1327

In the
Supreme Court of the United States
October Term, 1994

DEANNA BRAYTON,

Petitioner,

vs.

CITY OF NEW BRIGHTON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 9-040 of the New Brighton Code of Ordinances, as amended, permits one non-commercial sign per residential property at any time, plus an additional number of non-commercial signs per residential property for a temporary period before and after any election.

1. Is Section 9-040 of the New Brighton Code of Ordinances a content-neutral time, place and manner restriction of speech?

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No. 94-1327

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

DeAnna Brayton,

Petitioner,

vs.

City of New Brighton,

Respondent.

On Petition For Writ Of Certiorari
To The Minnesota Court of Appeals

BRIEF IN OPPOSITION

The Respondent City of New Brighton ("City") respectfully requests that the Court deny the Petition for Writ of Certiorari ("Petition") seeking review of the decision of the Minnesota Court of Appeals in this case. The opinion of the Minnesota Court of Appeals is reported as Brayton v. City of New Brighton, 519 N.W.2d 243 (Minn. Ct. App. 1994) and is reproduced in the appendix to the Petition (hereinafter "Pet. App.") at pages 1a to 12a. The Minnesota Supreme Court's order denying review is reproduced at Pet. App., 13a. The Petition should be denied because the Minnesota Court of Appeals opinion does not

conflict with the decisions of this Court, the United States Courts of Appeals, or the courts of last resort of other states.

STATEMENT OF THE CASE

Petitioner, a resident of the City, contends that Section 9-040 of the City's sign ordinance, as amended by an ordinance adopted in October 1991, is a facially unconstitutional restriction of her rights under the First Amendment to the United States Constitution. The City adopted its sign ordinance in order to preserve the residential character of residential neighborhoods, avoid clutter and litter, protect property values, reduce traffic hazards, and to accomplish other governmental interests as recited in the ordinance. Pet. App. 22a. To accomplish these ends, the ordinance contains a general prohibition against posting any sign, without first obtaining a permit. New Brighton Code § 9-020(a), at Pet. App. 22a. Section 9-040 of the Code excepts certain signs from the permit requirement, including non-commercial opinion signs[1] on residential properties. New Brighton Code § 9-040(c)(8) and (c)(16), at Pet. App. 24a and 25a.

The parties agree that, as amended, Section 9-040 permits a resident to post one non-commercial opinion sign on residential property at any time, whether the sign carries a political or other non-commercial message. Pet. App. 3a. The ordinance also allows additional noncommercial signs to be posted on any

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[1] Section 9-030 of the New Brighton Code defines a non-commercial opinion sign as a sign "which does not advertise products, goods, businesses or services and which expresses an opinion or other point of view." Pet. App. 23a. The parties agree that this definition encompasses both ideological/opinion and political/campaign speech. Pet. App. 3a.

property for temporary periods before and after elections.[2] Pet. App. 24a.

The durational period for the additional non-commercial signs varies in even-numbered and odd-numbered years. In even-numbered years, when state, federal, county and school district elections are held, and by operation of Minnesota Statutes, Section 211B.045, the durational limit for additional non-commercial signs is from August 1 until 10 days after the election. In odd-numbered years, when only city and school district elections are held, the durational limit is the later of the last day of candidacy filing or one month before the election until 5 days after the election. New Brighton Code § 9-040(c)(8), at Pet. App. 24a. The number of additional signs allowed is determined by the number of candidates or issues on the election ballot. Id. The additional signs may be devoted to any form of non-commercial speech, including opinion speech. Id.

Other signs are also exempted from the ordinance's permit requirement, including "for sale" and "for rent" signs, gasoline service station signs, and other signs. New Brighton Code § 9-040(b) and (c), at Pet. App. 23a - 24a. As explained in the following section of this brief, the City's sign ordinance does not allow any commercial or non-commercial speech sign in greater numbers or for greater duration on residential properties than the "non-commercial opinion sign" allowed under Sections 9-040(c)(8) and (c)(16).

Petitioner contends that the City's ordinance is unconstitutional because it prevents her from posting more than one sign on her property for a portion of each year. The only

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[2] Petitioner concedes that the additional signs may be devoted to any non-commercial speech, including opinion or political speech. Petition, page 3. However, in the "Questions Presented" section of her Petition, the Petitioner mischaracterizes the ordinance as allowing additional political campaign signs only, and not other non-commercial speech signs.

evidence that Petitioner introduced on the impact of the ordinance on her ability to speak was her statement:

> Putting up signs in my yard is the only practical way I have to inform people about the cruelty with which animals are treated by humans. I could not afford either the money and the time to make up and distribute flyers, or to canvass, or to advertise. I do go to city council meetings, but am permitted to speak for only a very limited period.

Affidavit of DeAnna Brayton, ¶ 6, at Respondent's Appendix, page 2 (hereinafter referred to as "A-2"). The Petitioner introduced no evidence that her ability to communicate her views would be substantially impaired by an ordinance that allows her to place one sign on her property at any time and further allows her to place an additional number of signs on her property for temporary periods.

REASONS FOR DENYING THE PETITION

The Court should exercise its discretion by not granting the Petition because there are no "special and important reasons" for granting it. Sup. Ct. R. 10.1. The Minnesota Court of Appeals decision neither conflicts with a decision from this Court nor with decisions on the same matter by other United States Courts of Appeals or state courts of last resort. Id. 10.1(b) and (c). Because the case does not meet the standards established by the Court for granting review on Writ of Certiorari, the Petition should be denied.

I. THE CITY'S ORDINANCE IS NOT INCONSISTENT WITH THIS COURT'S DECISION IN CITY OF LADUE V. GILLEO.

The Minnesota Court of Appeals held that the City's ordinance is "decidedly content neutral." Pet. App. 8a. Petitioner argues that, even if the City's ordinance is content-neutral, the ordinance is inconsistent with this Court's decision in City of Ladue v. Gilleo, 512 U.S. ___, 114 S. Ct. 2038 (1994). Petition, p. 8. The Petitioner's argument is unfounded, because, in contrast to the ordinance in City of Ladue, the City's ordinance does not "prohibit too much protected speech." Id. at 2043.

In City of Ladue, this Court appropriately recognized that even a content-neutral regulation may violate the First Amendment where it "foreclose[s] an entire medium of expression" and "totally foreclose[s] that medium to political, religious or personal messages." Id. at 2045. The City's ordinance is distinguishable from the ordinance in City of Ladue because it neither bans an entire medium of expression nor does it ban any particular category of speech. Under this Court's decisions, this distinction is significant, because "laws regulating the time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." Linmark Associates, Inc. v. Willingboro, 431 U.S 85, 93 (1977). In the City of Ladue opinion itself, this Court contrasted that city's total prohibition on residential signs with "regulations short of a ban." 114 S. Ct. at 2047, n. 17.

Unlike the ordinance in City of Ladue, the City's ordinance preserves the ability of its residents to speak from their properties, year-round, on any subject of the residents' choice. At the same time, the ordinance imposes reasonable numerical, durational, and size limitations to "address the ills ... associated with residential signs." Id.

By allowing residents to speak year-round from their properties on any subject of the residents' choice, the City's ordinance comports with this Court's decision in City of Ladue. The ordinance does not "prohibit too much protected speech."

Petitioner urges this Court to grant further review on the ground that a one-sign numerical limit is only "incrementally better than the outright ban addressed in City of Ladue . . ." Petition, pp. 8-9. There are two problems with this argument.

First, the Petitioner's argument is founded upon a mischaracterization of the ordinance. The City's ordinance does not restrict non-commercial speech to one sign per residence. The ordinance allows one non-commercial sign per property for part of the year, and temporarily allows additional non-commercial signs for a portion of each year. Petitioner's reliance on Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993) is therefore misplaced. The Arlington County court struck down an ordinance that allowed only two political campaign signs for a temporary, 80-day period. That ordinance stands in stark contrast to the City's ordinance, which permits non-commercial speech at any time of the year.

Moreover, so far as the City can determine, no state or federal court has ever held unconstitutional an ordinance like the City's. Indeed, in Ross v. Goshi, 351 F. Supp. 949 (D. Haw. 1972), the court upheld an ordinance similar to the City's that allowed a political sign to be posted any time during the year and allowed additional, temporary political signs for 60 days preceding and 10 days following an election.

The second flaw in the Petitioner's argument is that it is in reality an invitation to this Court to assign a numerical quantifier to First Amendment rights. Petitioner contends that one sign is not enough without any evidence that a one-sign limitation, plus a substantially greater number during a portion of the year, prevents her from communicating her ideas to the desired audience. Petitioner argues that "displaying multiple signs conveys a

heightened level of engagement and concern about the community." Petition, p. 9 n. 1. The same could be said of posting signs that are 100 square feet in size, yet courts have uniformly held that ordinances imposing reasonable size limitations are constitutional. Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976), cert. denied sub nom Leipzig v. Baldwin, 431 U.S. 913 (1977).

Petitioner's numerical approach to her First Amendment rights not only trivializes those rights, but it ignores the fundamental questions raised in First Amendment case law. Does the ordinance provide the Petitioner the opportunity to speak from her home? The answer is yes. Does the ordinance provide any greater opportunity for speakers with other commercial or non-commercial messages? As discussed below, the answer is no.

III. THE CITY'S ORDINANCE IS A CONTENT-NEUTRAL TIME, PLACE AND MANNER REGULATION.

The City's sign ordinance satisfies this Court's requirements for a content-neutral time, place and manner regulation. Petitioner contends that the ordinance is content-based, in two ways: (1) the ordinance favors political campaign speech over her ideological speech; and (2) the ordinance favors other categories of speech over her ideological speech. Those assertions are unfounded.

In her Petition, the Petitioner persistently misrepresents to this Court the provisions of the City's ordinance. At page 12 of the Petition, for example, the Petitioner asserts that the ordinance permits "virtually as many campaign signs as any resident would ever want to display, while according no such advantage to signs concerning non-campaign topics." This statement is patently false, as can be seen at pages 3 and 4 of the Petition, where Petitioner acknowledges that the ordinance allows residents to

display either non-commercial opinion signs or political campaign signs, subject to the numerical limits established in Sections 9-040(c)(8) and (16).

The City's ordinance treats political speech and opinion speech identically. During most of the year, a residential property owner may post one non-commercial sign per frontage on her yard that may be used to express any opinion or point of view, including support for a political candidate. New Brighton Code § 9-040(c)(16), at Pet. App. 25a. During election seasons a property owner may post additional signs (up to one sign per candidate or ballot issue, per street frontage), any of which may be devoted to any campaign or opinion message. New Brighton Code § 9-104(c)(8), at Pet. App. 24a.

The temporary expansion of the numerical limit on campaign and opinion signs during the election season does not make the ordinance content-based. Petitioner has not cited, and the City has not found, any case where a court held a sign ordinance like the City's to be content-based. To the contrary, state and federal court decisions support the ordinance's provision that allows a greater quantity of speech during the election season. Fisher v. City of Charleston, 188 W. Va. 518, 425 S.E.2d 194 (1992)(endorsing the use of durational limits on political campaign signs); Arlington County Republican Committee v. Arlington County, 983 F.2d 587 (4th Cir. 1993)(invalidating ordinance because of numerical limit on temporary campaign signs but approving 80-day durational limit); Baldwin v. Redwood City, supra (approving 70-day durational limit on political signs).

Rather than displaying a preference for political speech, the City's temporary expansion in the numerical limit only recognizes the increased number of speakers during an election season. Accord Arlington County, 983 F.2d at 595 (campaign sign regulation affects two groups of speakers: the homeowner and the candidates). In order to provide opportunity for the additional

speakers to communicate their messages, the numerical limit is temporarily increased for all types of non-commercial signs, including campaign and opinion signs. At all times of the year, political and ideological speech are treated identically under the ordinance.

Because the ordinance accords equal treatment to political and ideological speech, the ordinance does not violate this Court's proscription against treating some types of non-commercial speech more favorably than others. See Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 514 (1981). In holding that the numerical limitations in the sign ordinance do not render the ordinance content-based, the Minnesota Court of Appeals decision is consistent with the decisions of this Court.

Petitioner contends, incorrectly, that the City's ordinance treats other speech more favorably than campaign and opinion speech by setting less restrictive durational and numerical limits on those categories of speech. Petition, p. 14. That assertion is based upon a misunderstanding of the ordinance.

The ordinance allows one opinion or campaign sign year round, plus an additional number of opinion or campaign signs for a temporary period during election seasons. The durational limit on the expanded number of signs is August 1 until 10 days after the election in even years and approximately 40 days in odd-numbered years. As discussed below, no other residential sign is accorded more favorable treatment than noncommercial opinion or campaign signs.

First, petitioner misleadingly compares the limits for noncommercial opinion and campaign signs, which are posted on residential property, to limits for signs that are not allowed on residential property. Mattila Supp. Aff., ¶ 5, at A-4. Since those signs are not found on residential property, it is misleading to assert that those signs receive more favorable treatment than opinion and campaign signs on residential properties. The signs that are not found on residential properties include gasoline

service station signs, civic celebration signs, traffic signs, historical markers, and government information signs. Id.

When opinion and campaign signs are compared to other signs allowed on residential properties, it is apparent that the ordinance does not invert First Amendment values. The ordinance allows one non-commercial sign throughout the year and a significantly greater number on a temporary basis. No commercial sign is allowed in such great numbers over the entire year. See, e.g., New Brighton Code § 9-040(c)(7) (garage sale and real estate sale signs limited to one per frontage for temporary period); § 9-040(c)(9) ("for sale" sign limited to one per property); § 9-040(c)(10) (one construction identification sign per property, duration limited to actual construction). Mattila Supp. Aff., ¶ 6, at A-5.

Similarly, other non-commercial signs are treated no more favorably than opinion and campaign signs. For example, holiday decorations are allowed for a temporary period, but one opinion or campaign sign is allowed year round. Pet. App. 25a. Likewise, the lack of durational limits on a nameplate sign or a "no trespassing" sign does not offend the constitution, because the ordinance also allows one non-commercial opinion or campaign sign year round.

To the extent that any minor differences exist, the Petitioner's comparisons of opinion and campaign signs to other non-commercial signs amount to nitpicking. "[D]istinctions in degree become significant only when they can be said to amount to differences in kind." Baldwin, 540 F.2d at 1369, quoting Buckley v. Valeo, 424 U.S. 1, 30 (1976). Petitioner cannot seriously contend that the ordinance's treatment of "no trespassing" signs and cornerstones is an attempt to "choose the appropriate subjects for public discourse." Cf. Metromedia, 453 U.S. at 515.

Under any fair reading, the ordinance places the highest value on political and opinion speech, and the ordinance reflects the value placed on this speech by the First Amendment. The ordinance does not invert First Amendment values and satisfies the Metromedia tests for a content-neutral time, place and manner regulation of speech.[3]

CONCLUSION

Petitioner has failed to show why this Court should exercise its direction to review the Minnesota Court of Appeals decision upholding the constitutionality of the City's sign ordinance. Accordingly, the City respectfully requests that the Petition be denied.

Dated: March 1, 1995.

Respectfully submitted,

James J. Thomson
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(612) 337-9300

Attorney for Respondent

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[3] Although the Minnesota Court of Appeals also addressed the narrow tailoring and alternative channels of communications issues, the Petitioner has not raised those issues as a basis for this Court to grant certiorari. Consequently, the City does not address those issues in this brief.

APPENDIX

Affidavit of DeAnna Brayton A-1

Supplemental Affidavit of Erny Mattila A-3

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Other Civil

DeAnna Brayton Court File No. C7-93-2677

Plaintiff,

vs. **AFFIDAVIT OF DEANNA BRAYTON**

City of New Brighton,

Defendant.

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

DeAnna Brayton, being first duly sworn, on oath states as follows:

1. I am the plaintiff in the above-captioned matter. I live with my family at 1540 Mississippi Street in New Brighton.

2. In March of 1991, I put up two small signs in my front yard, concerning a decision made by a Nicollet County District Court judge in an animal cruelty case and stating my objections to the cruel treatment of animals.

3. I received a letter early in April, 1991, from Erny Mattila, the city planner. He told me about the city's sign

ordinance and said I had to take my signs down within a week, or I could be prosecuted. I did so.

4. After I complained about the ordinance with the assistance of the Minnesota Civil Liberties Union, the city council considered and adopted certain amendments. Several residents showed up at the council meeting to express their disapproval of my signs and oppose any amendments to the sign code.

5. In the fall of 1992, I put some political campaign signs up in my yard. I left one of them up after the election was over. Eric D. Schneider, community development assistant for the city, wrote me on November 24, 1992 to tell me that this violated the ordinance, and I had to take it down. Before I could react, the sign was stolen. I did not erect another.

6. Putting up signs in my yard is the only practical way I have to inform people about the cruelty with which animals are treated by humans. I could not afford either the money and the time to make up and distribute flyers, or to canvass, or to advertise. I do go to city council meetings, but am permitted to speak for only a very limited period.

FURTHER YOUR AFFIANT SAITH NOT.

/s/_____
DeAnna Brayton

Subscribed and sworn to before
me on this ____ day of July, 1993.

_____
Notary Public

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT

Case Type: Other Civil

DeAnna Brayton, Plaintiff, vs. City of New Brighton, Defendant.	**SUPPLEMENTAL AFFIDAVIT OF ERNY MATTILA** File No. C7-93-2677

STATE OF MINNESOTA)
) SS.
COUNTY OF RAMSEY)

ERNY MATTILA, being first duly sworn on oath, states and alleges as follows:

1. This affidavit supplements my earlier affidavit dated May 27, 1993 and is made in support of the defendant City of New Brighton's motion for summary judgment.

2. I have reviewed the plaintiff's Memorandum of Law in Support of Motion for Summary Judgment. At page nine of the memorandum, the plaintiff compares several provisions of the City's sign ordinance to the durational restriction on campaign

signs. The comparison is in some places inaccurate and misleading.

3. First, plaintiff mischaracterizes the durational limit placed on campaign signs under the ordinance. As I have interpreted and enforced the ordinance, the ordinance places a durational limit only on opinion or campaign signs in excess of the one sign allowed by § 9-040(c)(16). In other words, residential property owners may post one sign per street frontage under § 9-040(c)(16), which has no durational limit. Any additional signs are allowed only during the time period specified in § 9-040(c)(8), as modified by Minn. Stat. § 211B.045.

4. Plaintiff also mischaracterizes the ordinance by stating that the temporary sign limit is 30 days. However, as I stated in my earlier affidavit, the City has interpreted and enforced the ordinance in conjunction with Minn. Stat. § 211B.045. In even-numbered years, the durational limit for the additional signs is from August 1 until 10 days after the election, by operation of § 211B.045, or roughly 100 days. In odd-numbered years, the durational limit is the later of the last day of candidacy filing or 30 days prior to the election until 10 days after the election, or roughly 40 days.

5. In addition, some of the signs listed at page nine of the plaintiff's memorandum are not allowed on residential property and cannot be fairly compared to non-commercial opinion or campaign signs that are posted on residential property. As I stated in my earlier affidavit, the character of residentially zoned properties differs significantly from that of commercial and industrial properties.

a. Under the City's zoning ordinance, gasoline service stations are not allowed in residential zoning districts. Therefore, although § 9-040(c)(11) does not express so state, by operation of other code provisions, gasoline

service station signs are permitted only in commercial districts.

b. The civic celebration signs referenced at § 9-040(b)(6) have, to my knowledge, never been posted in a residential zoning district. Historically, this provision has only been used for signs promoting the only celebrations sponsored by the City -- "Squash Festival" and "Stockyard Days," and the signs have only been allowed at busy commercial intersections in commercial zoning districts. In addition, the civic celebration signs have historically been allowed for only one to two weeks.

c. Traffic signs, historical markers, and governmental information signs, which are allowed under § 9-040(b)(7) and (c)(2) and (3), are not posted on residential properties.

6. Signs on residential properties that contain commercial speech are not treated more favorably under the ordinance than the non-commercial signs allowed under §§ 9-040(c)(8) and (16).

a. The contractor advertising which is allowed under § 9-040(c)(2) is not comparable to signs posted on residential property. That section only concerns advertising on vans and trailers which are parked at a construction site during actual construction. The principal difference with this type of sign is that it is attached to a vehicle which moves in intrastate and interstate commerce. The City's ordinance treats all movable signs similarly, regardless of sign content. (E.g., parade floats and signs on service or delivery vehicles, § 9-040(b)(1) and (4).)

b. In addition, sites under construction have a distinctly different character than residential properties, and more

akin to commercial or industrial properties. This also applies to contractor identification signs under § 9-040(c)(10). The durational limit on contractor van signs and contractor identification signs is the period of actual construction, which is less than for non-commercial opinion or political signs allowed under § 9-040(c)(16) (no durational limit).

c. The garage sale and rummage sale signs that are allowed under § 9-040(c)(7) have identical size limits as non-commercial signs but a shorter durational limit -- 8 days. Real estate sale signs (i.e., "open house" signs) are limited to 3 days. Sale of produce signs have no durational limit, which is equivalent to the limit in § 9-040(c)(8).

d. The "for sale" and "for rent" signs allowed under § 9-040(c)(9) have the same size restrictions as non-commercial signs and are limited to one per property instead of one per street frontage plus additional signs for a temporary period. In addition, the durational limit is the period during which the property is for sale or rent, which is not less restrictive than § 9-040(c)(8), which has no limit.

7. The total number of noncommercial signs allowed on residential properties varies from year to year, depending upon the number of candidates and ballot issues in that year, and depending upon whether special elections or primaries are held in addition to general elections. In my experience, however, there are generally more candidates and ballot issues during state general election or even-numbered years, which is when all federal, state and county elective offices are filled. In odd-numbered years, there are normally fewer candidates and ballot issues, because only the city and school district offices are up for election.

8. The plaintiff has suggested that the City impose a year-round limit on noncommercial signs of 5-10 signs. In my opinion, this would likely reduce the total amount of noncommercial speech allowed on residential properties, because the number of candidates and ballot issues normally exceeds five and, in state general election years, is normally many more than 10.

/s/_____
Erny Mattila

Subscribed to and sworn before me
this ____ day of _____, 1993.

_____
Notary Public